COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINIATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
HAROLD B. MURPHY, Trustee of
Bankruptcy Estate of RICHARD SHANAHAN,

Complainants,

v. DOCKET NO. 07-BEM-02393

S&H CONSTRUCTION, INC.,

Respondent

Appearances: Lana Sullivan, Esq. for Complainant
Douglas W. Salvesen, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On September 14, 2007, Richard Shanahan[1] filed a charge of discrimination with this Commission against his former employer, Respondent, S & H Construction, alleging that Respondent discriminated against him by subjecting him to harassment in the form of ridicule and terminating his employment because of his disability. Complainant further alleged that Respondent engaged in acts of retaliation against him after he filed his MCAD complaint by bringing a law suit against him for monies he owed to Respondent and by taking possession of a vehicle owned by him, but used by his ex-wife, to satisfy the judgment obtained in that law suit.

[1] Richard Shanahan was initially the Complainant in this matter, but prior to the Hearing, the Trustee of Shanahan's Chapter 7 Bankruptcy Estate was substituted as the Complainant in this matter.

After an initial determination of Lack of Probable Cause the Investigating Commissioner reversed the Finding stating that there were material issues of fact in dispute to be determined by a fact-finder at an adjudicatory hearing. During the pendency of this action Shanahan filed a petition seeking protection in Bankruptcy. On September 9, 2013, Harold Murphy, the Chapter 7 Trustee of the Bankruptcy Estate of Richard Shanahan moved to be substituted as the Complainant in this matter to secure any recovery for the benefit of Shanahan's creditors, and the Motion was granted. The matter proceeded to hearing on January 27-30, 2014 before the undersigned hearing officer. The parties have submitted post-hearing briefs. Having reviewed the record and the post-hearing submissions of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Richard Shanahan is a 46 year old male who has suffered since birth from a hearing impairment due to nerve loss. He testified that he has hearing loss in both ears and has worn hearing aids on and off throughout his life. Shanahan testified that in circumstances where there is a great deal of background noise he cannot hear without a hearing aid, but when he wears a hearing aid, his hearing is significantly improved although it is not 100%. (Tr. 59, 61 62, 63) Shanahan has worked in various capacities since graduating high school including as a carpenter. He did not request an accommodation for his hearing impairment in any of those jobs because he had a functioning hearing aid and did not need an accommodation. (Tr. 64, 65, 299)

2. Respondent, S&H Construction, Inc., is a Massachusetts corporation with a principal place of business in Cambridge, MA. Respondents' business is custom home building services and residential renovation in the Greater Boston area. It employs approximately 60 employees. Respondent's principals, Alex Slive and Douglas Hanna, are each 50% owners and operate the

business together. (Tr. 677-678) Respondent employs 15-20 job supervisors who work at the job site and who deal primarily with the client. It also employs carpenters, laborers and masons. (Tr. 679-680) Slive testified that the company has employed and accommodated individuals with disabilities. (Tr. 681-683)

3. Shanahan began working for Respondent as a carpenter in 1996 or 1997 and eventually became a job supervisor. Respondent's principals knew that Shanahan was hearing impaired when he was hired and Slive testified that his hearing impairment was not an issue. (Tr. 66, 67, 685) He worked for Respondent for approximately three years before leaving on good terms for a job that offered better health insurance. (Tr. 66, 628) Shanahan's hearing aid was operational during his initial term of employment and he testified that he did not experience any discrimination during that time. (Tr. 72, 305)

4. On or about March of 2003, Shanahan returned to work for Respondent. (Tr. 72, 686) Shanahan was assigned to work with an employee named Joseph Ramunno for two days on a project involving installation of a door. (Tr. 74-75) He testified that even though his hearing aid was working at the time, he had difficulty hearing Ramunno on the other side of the door, that they struggled to communicate, and that Ramunno was frustrated by this. They worked together only a few more days in 2003. (Tr. 73-75) Shanahan testified that he heard from another employee that she overheard Ramunno refer to Shanahan as a "deaf mute," and said he did not want to work with Shanahan again. (Tr. 77-78) Shanahan alleges that two other employees told him that they heard Ramunno refer to him as the "bionic ear." (Tr. 77, 79-81) The female employee who is alleged to have heard these comments did not testify at the hearing. John Caruso testified, but denied hearing other job supervisors make comments about Shanahan's disability or express frustration about working with him because of his disability. (Tr. 801-804)

I found Caruso to be a credible witness. Shanahan did not report the comments he heard about to Respondent's owners Slive or Hanna since he was no longer assigned to work with Ramunno and figured he would "just deal with it." (Tr. 408, 409, 75) Slive and Hanna testified credibly that they had no knowledge of anyone expressing frustration with or ridiculing Shanahan because of his hearing impairment, and Shanahan did not complain to them about this. (Tr. 686-687, 779-780) Shanahan did not work with Ramunno again until the summer of 2006. (Tr. 75)

5. Ramunno testified that he did not recall being on any job with Shanahan and could not recall him being an employee of Respondent. (Tr. 881) I do not credit this testimony. I believe that Ramunno may have made comments about Shanahan's disability, however there is no evidence that Slive or Hanna were aware of these comments. Slive testified that some of the job supervisors did not want to work with Shanahan, but not because of his hearing impairment. (Tr. 686) Caruso testified that Slive told him that he did not know what to do with Shanahan because some job supervisors did not want to work with him. Caruso responded that Shanahan could work with him. (Tr. 796) Slive admitted telling Shanahan that some supervisors did not want to work with him. He testified that the reason for this was Shanahan's work ethic and because Shanahan did not call in when he was not coming to work. (Tr. 528)

6. A number of Respondent's job supervisors testified that they had issues with Shanahan's work ethic and his attitude. John Murhpy testified that he remembered Shanahan's seeming unwillingness to take direction and poor attitude. (Tr. 871) Caruso testified that Shanahan told him he used his hearing impairment to his benefit when he chose to. (Tr. 810) Others testified about Shanahan's shoddy workmanship, his not showing up, or reading his newspaper in his truck while on the job. (Jt. Ex. 1, pp. 32-33; Tr. 893-895)

7. In the Fall of 2005, Shanahan's hearing aid stopped operating, was no longer under warranty, and he could not afford to purchase a new one. (Tr. 118) Shanahan told Hanna that his hearing aid had broken and that he was having difficulty hearing as a result. (Tr. 118-119) Slive remembered being told that Shanahan's hearing aid was broken and stated that the company loaned Shanahan $4,500 at some point but that he did not recall that Shanahan requested the loan for a hearing aid. (Tr. 687) Hanna confirmed that Shanahan sought and was given a loan by Respondent, but he did not know for what purpose. (Tr. 781) Slive testified that when Shanahan's hearing aid was functional, Shanahan did not have difficulty communicating on the job, and that prior to 2005, there were no significant problems with his job performance. (Tr. 524)

8. Shanahan testified that after his hearing aid broke, he began to dread going to company meetings on Wednesday mornings and stopped participating in these meetings because he could not hear what was being said. (Tr. 120-121) He told Slive he did not feel comfortable participating in the meetings but Slive encouraged him to attend nonetheless. Hanna had no memory of Shanahan being uncomfortable or ridiculed at these meetings because Shanahan couldn't hear what was being said. (Tr. 781-783) Other employees who testified denied or had no memory of Shanahan being teased, ridiculed or made fun of at these meetings or elsewhere in the workplace. (Tr. 805,852-853, 866-867, 871,892) Shanahan was not disciplined for not attending the meetings. (Tr. 120)

9. From approximately January to April of 2006, Shanahan was the job supervisor on at least two projects for specific customers and also performed work as a carpenter on several other job sites. (Tr. 117-118)

10. In April of 2006 Shanahan went out on an unpaid leave of absence to have knee surgery for an injury he sustained in a car accident while on the job in January of 2006. His recovery took approximately two months. (Tr. 127-129) When he returned to work in June of 2006, he still did not have an operational hearing aid.

11. In June of 2006 Shanahan worked as the carpenter on a large multi-million dollar project for which John Murphy was the job supervisor. He claimed that he often told Murphy that he had could not hear him, and that Murphy became agitated and accused him of having "selective hearing." He did not speak to Slive or Hanna about this comment. (Tr. 129-130) Murphy testified that he could not recall anything about Shanahan's work on the large project but he remembered one specific interaction with Shanahan on another job involving renovations to a basement. He testified that he had to explain the task to Shanahan a couple of times but not because of his hearing. He felt that Shanahan was intentionally not cooperating, stating it couldn't be done and demonstrating a bad attitude. He was frustrated because Shanahan seemed unwilling to do the work. He denied telling Shanahan that he had "selective hearing," and never told Slive or Hanna that he did not want to work with Shanahan. (Tr. 868-872) I found Murphy to be a very credible witness.

12. In the summer of 2006, Shanahan worked on a project with Michael Segal, who was the job supervisor. Segal testified that Shanahan did some work building some "cheek walls" and a "mansard roof " for three windows and that the work was not done properly. (Jt. Ex. 1 p. 29) The customer complained and he reported this to Mr. Hanna. (Jt. Ex. 1, pp. 32-33) Segal also testified that Hanna had some questions and concerns about Shanahan possibly padding his hours on that project and asked Segal to review the hours Shanahan billed for. (Jt. Ex. 1 p. 28; Tr. 726) Hanna testified that he had a complaint from a customer about being billed for hours

Shanahan was observed sitting in his truck. (Tr. 730-73, 738) After that project, Segal asked Hanna and Slive not to place Shanahan on any projects with him, because he did not think Shanahan was a very good carpenter and because he had a very negative attitude. (Jt. Ex. 1 pp. 38-40) Complainant alleged that Segal made fun of him because he was hard of hearing but that Segal claimed to be hard of hearing also. (Tr. 135-136) Segal never heard any other employee complain about Shanahan's hearing impairment. (Jt. Ex. 1, p. 45)

13. Scott Ramey testified that he was co-supervisor with Shanahan on a job in Lexington and that Shanahan wasn't at the job much and was often reading the paper. He specifically recalled one incident where the other workers on the project had to "button up" the roof because it started to rain and he had to get Shanahan out of his truck where he was sitting reading the paper and ask him to help. (Tr. 893-895) Caruso testified that towards the end of that project in the fall of 2006, Shanahan was assigned to do "punch-list" type jobs such as vacuuming up debris when he was instead painting his own truck in the homeowner's driveway and the homeowner complained about this to Caruso. (Tr. 789, 793)

14. Daniel Pedersen testified that he worked as a laborer, carpenter and job supervisor for Respondent and worked with Shanahan a few times when he was a carpenter and Shanahan was a job supervisor. (Tr. 908) Pedersen knew that Shanahan had a hearing impairment but stated that it did not interfere with his work, and he never witnessed Shanahan being treated differently because of his hearing impairment. (Tr.909-910) He stated that no job supervisors ever indicated to him that they did not want to work with Shanahan, but some complained about his being lazy at times, and reading the newspaper while on the job. Pedersen witnessed Shanahan reading the newspaper a few times while working on a job with him, and he considered Shanahan to be lazy for that reason. (Tr. 912-913) He also recalled working on a job

with Shanahan in Cambridge where the client was unhappy with the work that Shanahan performed and that parts of the work had to be redone. (Tr. 914-915)

15. Raymond McDonald who has been employed by Respondent as a carpenter and job supervisor since 2004, testified that he worked with Shanahan on one job in Cambridge and knew the he had a hearing impairment, but that it did not interfere with his work. (Tr. 922-923) He testified that when he worked with Shanahan on that job, Shanahan did not work and would sit in the truck and read the newspaper for almost the entire day and would sometimes leave the job site saying he had to go to the office. (Tr. 927-928, 931) He stated that he did not report this to Slive or Hanna because "you just don't rat people out." (Tr. 931) McDonald considered Shanahan to be lazy and assumed that Shanahan was fired because of his lack of a work ethic. (Tr. 927) He had no difficulty communicating with Shanahan and did not notice that anyone else did. (Tr. 924) He was not aware of any other employees ridiculing or teasing Shanahan or complaining that they were frustrated with him because of his hearing impairment. (Tr. 924-926) McDonald remembered Shanahan telling him that he liked working with John Caruso and did not want to work with other job supervisors. McDonald testified that Shanahan and Caruso were "buddies," and that he assumed that was why Shanahan preferred to work with Caruso. (Tr. 929-930) I found McDonald to be a credible witness.

16. Eileen Leister has been employed by Respondent since 2001, as a laborer and carpenter's assistant. She progressed to job supervisor in 2009 or 2010. (Tr. 934-936) She was assigned to work under Shanahan three or four times when she was a laborer. (Tr. 937) She knew he had a hearing impairment when he lost the use of his hearing aid but she had no difficulty communicating with him. (Tr. 937) She never witnessed or heard anyone in the company ridicule Shanahan because of his hearing impairment, and no employee ever

communicated to her that they were frustrated with Shanahan because of his hearing impairment. (Tr. 938- 940) She stated that she knew very little about the quality of Shanahan's work but did recall him reading the paper a lot when she worked with him. (Tr. 942-943) She stated that Shanahan always seemed like an "unhappy person," who had a "dark cloud hanging over his head." She recalled that he was not an upbeat person on the job and that this makes a difference on the job site. (Tr. 944-945) She recalled Shanahan telling her that he had financial issues that were stressful for him. (Tr. 945-946) She learned about Shanahan's MCAD claim at a company supervisor's meeting some six months prior to the hearing. (Tr. 946-947) I found Leister to be a very credible witness.

17. Slive testified that in the Fall of 2006, he became aware of some issues concerning the quality of Shanahan's work. He stated that on one of Hanna's projects he recalled the company having to pay someone to re-do work that Shanahan had done. (Tr. 519,520;691-692) Slive testified that he had further concerns about a pattern of Shanahan not informing him when he was not coming into work, pursuant to the company policy that required calling the office. (Tr. 692-693) He had no memory of a specific day that Shanahan did not call in, but implied from time sheets he referred to that there was a pattern of unexplained absences or times when Shanahan requested vacation pay, sometimes as an advance, because he was not coming in. (Tr. 506,507; 694-695, 709; Ex. C-4) Hanna testified that there were times when Shanahan did not show up and did not call in, though he could not recall a specific incident. (Tr. 727) He testified that this information may have come from Slive or the job supervisors. (Tr. 764) Slive also testified that Shanahan used company checks or credit cards to inappropriately charge materials for his own use, and not company projects. (Tr. 699)

18. On Monday, October 30, 2006, Shanahan was working at a job site and Caruso was the job supervisor. Shanahan was working alone doing mostly punch-list and clean-up work. Caruso stopped by the job site and asked Shanahan to vacuum up debris. (Tr. 150-152) Shanahan phoned Caruso around lunch time to inform him that he was not feeling well, was going home and would likely be out the next day. Shanahan's wife and children also had a stomach flu and were vomiting. Shanahan's testimony about if and when he called the company offices is inconsistent. At the hearing Shanahan testified for the first time that he left a message on the company's general voice mail box on Tuesday night October 31st that he would not be in on Wednesday, but that he would call the office payroll manager, Christine Poisson, to report his hours for the previous week. (Tr. 153, 155) Slive testified that there was no message from Shanahan on the company answering machine. (Tr. 700-701) Shanahan did not mention the Tuesday night call in his earlier submissions to the Commission, but did state that he called Respondent's payroll manager on Wednesday, November 1st and informed her he would not be in. Poisson testified that Shanahan called in his hours to her after 10:00 a.m. on Wednesday but did not tell her he would not be in work. She wrote "called in" on the upper right-hand corner of the time-sheet, presumably to indicate that his hours had been called in to her. According to Shanahan, on Wednesday night he called Caruso to inform him he would return to work the following day. (Tr. 158) Slive spoke to Caruso on Thursday morning as he was prepared to send someone else to the job site and Caruso informed him the Complainant was not there. Slive then called Shanahan at his home and terminated his employment. (Tr. 535) According to Shanahan, he told Slive that he had called Caruso to inform him that he and his entire family were sick with a stomach flu. (Tr. 159) Shanahan admitted that he was still at home on Thursday morning when Slive called him sometime between 8:00 and 10:00 a.m. when he would typically already

be at the job site. He told Slive he was out with the flu. (Tr. 159) Shanahan stated that the starting time at Respondent was between 7:00 and 8:00 a.m. and that he generally starts as early as possible. (Tr. 365)

19. Respondent has a mandatory written "Call In" Policy that requires an employee to Call Respondent by 7:00 a.m. on any day that the employee is going to be late or is unable to report for work due to illness. (Ex. R-14) The policy specifically states that this is mandatory, and that the job supervisor should also be alerted to an absence, but that under no circumstances is alerting the job supervisor a substitute for calling the office. The reason for this is that Slive is primarily responsible for arranging schedules so as to properly staff and coordinate up to 40 active jobs. This requires finding substitute workers for a project if necessary. (Tr. 693, 711-713) Slive testified that the policy is important because "jobs can't be run successfully if we don't know who is there or what is going to happen next." (Tr. 693) While Shanahan may have contacted his job supervisor Caruso on his last job this did not comply with the company policy.

20. Slive testified that Shanahan was terminated after he went home sick on Monday October 30, 2006, and did not return to work for several days and did not call the office or Slive's cell phone. Slive denied that Shanahan left a message on the company answering machine. (Tr. 700-701) On Thursday of that week when Slive learned that Shanahan was still not at work, he was extremely frustrated. He testified that the company was under pressure from the client to get the job finished. (Tr. 506) He called Shanahan and told him that being absent three days in a row with no communication was unacceptable and terminated his employment. (Tr. 701) Slive stated he might have learned of Shanahan's absences from Caruso who was the job supervisor, and that if Shanahan called Caruso, this was not in accordance with company policy. (Tr. 700-701) Shanahan met with Slive and Hanna the next day to discuss his

termination, but Slive refused to change his mind. Slive reiterated his frustration and the reason for firing Shanahan stating that he didn't' show up for work and did not call in. He testified that because the project was at a critical phase, he had to take someone off another job and move them to Shanahan's job. (Tr. 713) He reminded Shanahan that he owed the company $8000 that had been loaned to him and that the company expected to be repaid. (Tr. 702) Shanahan testified that he had sought and received loans from Respondent in June and August of 2006 because he was having difficulty making his mortgage payment. (Tr. 256-25, 259) He did not make any payments on the loans. (Tr. 257-258)

21. Shanahan testified that during their in-person discussion Slive complained about his work on a project and told him that he had no place for him, that he could not "run a job" or "work a job," that certain co-workers did not want to work with him because they had difficulty communicating with him, and that it was best if he work alone. (Tr. 160-161) He also claimed that Slive grabbed him by the arm and spit in his face. (Tr. 161) I do not find this latter allegation to be credible, but do believe that Slive told Shanahan certain job supervisors did not want to work with him. This is consistent with the testimony of a number of job supervisors that they thought Shanahan was lazy and would sometimes disappear from a job site. I believe that Slive also mentioned there being a communication issue, but he testified this was about Shanahan's not complying with policy by not letting job supervisors know when he was not showing up. (Tr. 703) Shanahan thereafter contacted Caruso to inquire if he knew what was going on and to ask him to intercede on his behalf. Caruso told Shanahan he would talk to Slive but never got back to Shanahan. Shanahan reached to out other co-workers to help him out, but to no avail. (Tr. 162-164) Slive did not change his mind about the termination.

22. Slive testified that Respondent sends monthly statements to employees who owe the company money, and Shanahan testified that he received two or three statements. (Tr. 221) Respondent took no legal action against Complainant for more than one year after his termination. (Tr. 705) On October 30, 2007 approximately one month after Shanahan filed his MCAD complaint, Respondent filed a Complaint in Cambridge District Court against him seeking to recover $8, 050.12 in monies owed to Respondent for a loan, plus alleged overdrawn vacation time and healthcare premiums. (Ex. C-10) Shanahan did not file an answer or appear in the Cambridge District Court action because he had no money and could not afford a lawyer. Respondent ultimately obtained a default judgment against him and then proceeded to execute on the judgment. (Tr. 221-222) Hanna testified that sometimes loans to employees that are unpaid are taken as a loss and a tax write-off. (Tr. 722) Slive testified that on one other occasion, Respondent took out a criminal complaint in District Court to recover monies that were misappropriated by an employee. (Tr. 706, 556-557,560) This was the only other instance wherein Respondent took court action to recover monies from an employee. Others were loaned money they did not repay and Respondent did not sue to recoup those loans. (Tr. 542-543; 549)

23. After receiving a default judgment in the District Court matter, on or about November 20, 2008, Respondent sought to satisfy the judgment by taking possession of a mini-van owned by Shanahan that was being used by his ex-wife to transport their three daughters. Shanahan was contacted by his ex-wife who was frantic that the car had been towed from her home. Shanahan advised her to call Slive the next day to get the matter straightened out. (Tr. 222-224, 228, 619-620) According to Mrs. Shanahan, she was hysterical when she called Slive the following day and told him she needed the van to transport her children. She testified that at first he seemed sympathetic to her plight, but then told her she could get the car back if she

prevailed upon her ex-husband to drop the MCAD lawsuit. He called her back the next day and was much less sympathetic telling her she was absolutely not going to get the car back unless Shanahan dropped the law suit. (Tr. 620, 621) She relayed the substance of this conversation to Shanahan. (Tr. 224) Mrs. Shanahan testified that it took almost a month to get the car back through discussions with attorneys and in the interim her mother rented her a car. (Tr. 621) Her daughter missed school for a couple of days because they had no car and her parents ended up paying over $2000 to get the car back. She stated that it was basically a month of complete hell, caused great uproar in the family and was a "big mess." (Tr. 621, 622) Shanahan testified that everyone in his family was "yelling" at him and pressuring him to resolve the matter. (Tr. 224) Shanahan also owned a truck at the time but Respondent did not seek possession of the truck. According to Shanahan, Respondent also placed a lien on the family home he owned in Norwood that he had purchased from his father. (Tr. 226-227) Shanahan ultimately lost the home in foreclosure proceedings and he filed for bankruptcy in 2010. (Tr. 230, 234) The bankruptcy was subsequently converted into a Chapter 7 proceeding and ultimately Shanahan received a discharge of the approximately $250,000 owed to creditors after liquidation of his assets. (Tr. 479-480, 483; C-11)[2] Respondent was one of the creditors listed in the bankruptcy proceeding and is owed approximately $10,000 pursuant to the judgment in the District Court action. (Tr. 236)

III. CONCLUSIONS OF LAW

A. Discrimination Based on Handicap

General Laws c. 151B, § 4(16) makes it an unlawful practice for an employer to dismiss from employment or otherwise discriminate on the basis of handicap against any person who is a

[2] As stated earlier the Bankruptcy proceeding has been re-opened and the Trustee in Bankruptcy substituted as the moving party in this matter. Thus any damages awarded in this matter will inure to the benefit of Complainant's creditors.

qualified handicapped person capable of performing the essential functions of the job with reasonable accommodation. In order to establish a prima facie case of discrimination on the basis of handicap discrimination, Shanahan must present credible evidence that he is disabled within the meaning of the statute, is qualified to perform the essential function of the job with or without a reasonable accommodation, that he was terminated or otherwise subjected to an adverse action by his employer, and his employer sought to fill the position. Dartt v. Browning Ferris Industries, Inc., 427 Mass. 1998. Shanahan need not show as part of his prima facie case that he was terminated solely because of his handicap. Id.

To establish a prima facie case of a hostile work environment based on harassment because of his disability, Shanahan must demonstrate that he was subjected to work environment "pervaded by harassment and abuse resulting in "intimidation, humiliation, and stigmatization," which posed a "formidable barrier" to [his] "full participation in the workplace." College-Town Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987) In short Shanahan must demonstrate that the harassing behavior is severe and pervasive, that his employer knew or should have known of such behavior, and that it failed to take adequate measures to remedy the harassment. Id. at 167.

Shanahan has established a prima facie case that his hearing impairment was a factor in the decision to terminate his employment. Shanahan is disabled as a result of a hearing impairment he has suffered since birth and for which he has utilized hearing aids at various times throughout his life. He has difficulty hearing if there is a great deal of background noise. He testified that without his hearing aid, he had some difficulty with communication from co-workers while working for Respondent as a carpenter and could not hear some of the conversation at weekly job supervisor meetings. He asserts that he was informed by Slive that a

number of job supervisors did not want to work with him because of communication issues. He also asserts that co-workers subjected him to name calling or ridiculed him because of his hearing impairment and that this is evidence of animus related to his disability. Finally he provided evidence that other co-workers who were not disabled were not terminated for violating the call-in policy and that said policy was not always strictly enforced.

In contrast to his termination, Shanahan has not produced sufficient evidence to support an actionable claim of a hostile work environment against his employer. Despite there being some credible evidence that one co-worker made derogatory references to his hearing impairment, there is no evidence that these comments were made directly to him or that management was aware of these comments. Shanahan was told by a co-worker that she overheard one employee make some derogatory references to his hearing, but he did not report this to management. Shanahan worked with this employee on a very limited basis during his tenure with Respondent. While other employees may have made an occasional reference his hearing impairment, it was not to ridicule or insult him. All the employees who testified denied hearing any derogatory references, and Slive and Hanna were not made aware of any harassing behavior towards Shanahan. In short, there is insufficient evidence that Shanahan was subjected to a work environment pervaded by harassment and abuse based on his disability.

Once Shanahan established a prima facie case with respect to his termination, Respondent must articulate a legitimate non-discriminatory reason for its adverse action supported by some credible evidence. Blare v. Husky Injection Molding Systems, Inc. (419 Mass. 437, 442 (1995); Abramian v. President &Fellows of Harvard College, 432 Mass. 107, (2000)

Respondent stated that a number of job supervisors did not wish to work with Shanahan, not because of his hearing impairment, but because of his work ethic and lack of dependability. The testimony of a number of Respondent's employees supported this assertion. These employees all credibly denied that they were bore any animus towards Shanahan because of his hearing impairment. While there was evidence the some coworkers were frustrated with Shanahan this did not appear to be about his hearing impairment but related to his negative attitude and poor work ethic. Finally Respondent stated that Shanahan's termination resulted from his three day absence from the job and his failure to call in to Slive to notify him that he was not coming to work, pursuant to a company policy. Slive stressed the importance of such communication because of the need to meet the scheduling demands of a number of projects being worked on simultaneously. I conclude the Respondent has articulated a legitimate non-discriminatory reason for Shanahan's termination.

Complainant asserts that his failure to comply with the call-in policy is pretext for discrimination based on his disability because he notified his job supervisor Caruso that he was out because of a stomach flu, because he had called the office to report his hours for the week to the payroll person, and because Respondent did not always administer the call-in policy in so strict a manner. While these facts might call into question the credibility of Respondent's assertion that violation of the policy was the primary reason for Shanahan's termination, it does not prove the Respondent was motivated by discriminatory intent, motive or state of mind related to his disability. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). The ultimate burden to prove discriminatory motivation rests with Complainant.

I conclude that Shanahan has failed to prove that Respondent's reasons are a pretext for disability discrimination for the following reasons. Respondent hired Shanahan knowing he had

a hearing impairment. Satisfied with his performance during this initial period of employment, Respondent rehired him after he left the company voluntarily for a period of time. During his tenure with the company Respondent accommodated his need for extended time off for knee surgery and permitted him to return. There was also evidence that Respondent granted accommodations to other employees who were injured on the job or otherwise needed a leave of absence, thus demonstrating its willingness to accommodate disabled employees. In addition, when some employees informed Slive that they did not wish to work with Shanahan for reasons unrelated to his hearing impairment, rather than simply terminate his employment, Slive sent him to work with Caruso, when Caruso volunteered to take him. It was only after he failed to call in to Slive for three days while working on a job with Caruso that Slive made the decision to terminate Shanahan's employment with Respondent. Given these facts, and the testimony of several employees regarding their dissatisfaction with Shanahan's attitude and questionable work ethic, Complainant has failed to persuade me that Respondent was motivated by discriminatory intent related to his disability when it terminated his employment.

B. Retaliation

Shanahan has also alleged that he was the victim of retaliation for having filed a claim of discrimination against Respondent. He asserts that Respondent's filing of a suit against him in court to recover money the company loaned him and its seizure of an automobile used by his ex-wife and children, were retaliatory actions, undertaken out of a motive to punish him for filing a claim at the MCAD and to pressure him to dismiss his MCAD claim. G.L. c. 151B, §4(4) prohibits retaliation against individuals who oppose practices prohibited by the statute. Such protected activity includes filing a claim at the MCAD alleging unlawful practices. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or

to rid the workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995) An act of retaliation can occur after the employment relationship between the two parties has been terminated and the individual alleging retaliation need not be a current employee to benefit from the statute's protection. Psy-Ed Corporation, et al. v. Stanley Klein, et al., 459 Mass. 697, 708-709, 712-713 (2011). Shanahan asserts that the actions of Respondent in filing the law suit to recoup monies loaned to him and its actions in seeking to execute on the judgment constitute retaliation. I conclude that Shanahan has established a prima facie case of retaliation.

Once a prima facie case is established, the burden shifts to Respondent to articulate a legitimate non-discriminatory reason for the action, supported by credible evidence. Blare, supra. Respondent has asserted that the lawsuit to recover money owed to the company cannot be retaliation because the suit had a legitimate basis in law and fact and therefore constitutes the exercise of an absolute constitutionally protected right to seek judicial resolution of a dispute. Psy-Ed, supra. at 709; Sahli v. Bull HN Info. Sys., Inc. 437 Mass. 696, 700 -701(2002) Notwithstanding this right, there is language in Sahli, referring to the petitioner's motive stating that the "record lacked evidence that the employer's purpose" was other than for the legitimate reasons it asserted relating to violation of a contract. Sahli, supra. at 704-705. The fact-finder may inquire whether the intent in filing the law suit is "subjectively genuine and objectively reasonable," and may conclude that a suit that is not entirely baseless, may nonetheless, be retaliatory if it is not subjectively genuine. Psy-Ed, supra. 709-710 *citing* BE & K Construction v. NLRB, 536 U.S. 516, 536-537 (2002)

Respondent also asserts that its actions to take possession of the automobile registered to Shanahan were non-retaliatory as they were undertaken pursuant to Respondent's legal right to satisfy the judgment it had won, and that its motive in seizing and retaining the automobile was solely to recover monies lawfully due the company from Shanahan. It asserts that it undertook lawful seizure of vehicle to which Shanahan had legal title, regardless of who was using the car.

While I conclude that there was a basis in law and fact for the law suit to recover monies Respondent had lent to Shanahan, I conclude the motive for filing the suit was not "subjectively genuine" and that the lawsuit and Respondent's actions thereafter were undertaken to compel him to drop his MCAD claim and in retaliation for his having filed the claim. This is evidenced by the fact that Respondent had only one other time used legal process to recover past due funds from an employee and that was a criminal complaint resulting from an employee stealing money from the company. The fact that Respondent generally wrote off unpaid loans as a loss for tax purposes is also significant. Finally, once Respondent was made aware of the fact that Shanahan's wife was in dire need of the vehicle to transport her children, he told her if she wanted the car back, Shanahan should drop his MCAD claim. He ultimately presented her with an ultimatum that he would release the vehicle only if she convinced her ex-husband to drop his MCAD law suit. When this did not happen, it took almost a month and several negotiations with attorneys and calls to the MCAD investigator to regain possession of the car and this, only after Shanahan's in-laws had to pay a significant sum of money. I conclude that Slive's actions were undertaken with retaliatory motive to punish Shanahan for filing an MCAD complaint, to compel him to give up that claim, and to deliberately chill his rights to proceed with the claim. Given all of the above, I conclude that Respondent engaged in unlawful retaliation in violation of G.L. c. 151B §4 (4).

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. Since I have concluded that Shanahan's termination was not motivated by discriminatory animus, he is not entitled to back pay or other lost benefits. He is however entitled to damages for emotional distress if proved, arising from Respondent's acts of retaliation. See Stonehill College v. MCAD, 441 Mass 549 (2004). An award of emotional distress damages must rest on substantial evidence that is causally connected to the act of discrimination or retaliation. See DeRoche v. MCAD, 447 Mass 1, 8 (2006) (where evidence that emotional distress was caused by employee's termination and not subsequent acts of retaliation, court found no causal connection between the latter acts and employee's emotional distress)

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in awarding such damages are the nature and character of the alleged harm, the severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. Id. at 576. The vast majority of Shanahan's testimony about his emotional distress suggests that it was the loss of his job and income and related financial stresses that contributed to the dissolution of his marriage and led to the loss of his home in 2010 and extraordinary difficulties for him and his children when they found themselves homeless. These very unfortunate circumstances are regrettably not compensable where Respondent was not found to have been motivated by discrimination. However unfair Shanahan's termination may have seemed, I have concluded that it was not unlawful. Notwithstanding this, there is some evidence that Respondent's subsequent acts of retaliation caused Shanahan great stress. His ex-

wife contacted him frantically seeking to know why the car had been seized and seeking his assistance. He felt powerless to help her regain possession of the car she needed to transport their children after Slive refused to release the car. He was under pressure from his ex-wife to drop his MCAD claim and he suffered the wrath of his family and his in-laws, who all put pressure on him to resolve the matter. He stated that everyone was yelling at him. He contacted the MCAD investigator to enlist her intervention and support. Shanahan's wife testified that the entire ordeal was a big mess, caused a great uproar in the family, and that it was basically a month of complete hell. I conclude that Respondent's actions which I have found to be retaliation in violation of G.L. c. 151B, caused Shanahan additional emotional distress and compounded the stress he was already experiencing due to financial hardship. I find that Shanahan is entitled to an award of $25,000 for the emotional distress he suffered as a direct consequence of Respondent's unlawful actions. I also conclude that given the egregious nature of Respondent's conduct, which I find was a knowing and willful violation of G.L. c. 1515B § 4(4), it is appropriate to assess a civil penalty against Respondent in the amount of $5000.

V. ORDER

In light of the foregoing findings of fact and conclusion of law it is hereby Ordered that:

(1) Respondent cease and desist from actions and conduct that violate G. L. c. 151B § 4(4).

(2) Respondent pay to the Complainant Trustee in Bankruptcy, the amount of $25,000 with interest thereon at the rate of 12% per annum from the date the complaint was filed, until such time as payment is made or until a court judgment on the matter is rendered and post-judgment interest begins to accrue.

(3) Respondent pay to the Commonwealth, the sum of $5000 as a civil penalty.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to § 5 of c. 151B, Counsel for Complainant may file a Petition for attorney's fees.

So Ordered this 24th day of September, 2014.

Eugenia M. Guastaferri
Hearing Officer